In the Supreme Court of the Hawaiian Islands.

June Term, 1896.

Lui and Kilauano, Aleka and Maluhia, minors, by their Guardian, David Kua.

v.

William Kaleikini.

Before Judd, C. J., Frear and Whiting, JJ.

An agreement in the form of a constitution was made by tenants in common of a tract of land by which they delegated to an officer called a Luna Nui (General Manager) appointed by them the care and control of their common estate. In pursuance of this power the general manager, by a writing, set off in severalty to each tenant portions of the common estate for occupation, subject to the approval of the tenants as to locality, as expressed by the vote of a regular meeting of the tenants.

Held, this agreement is binding until rescinded.

Where one of the above tenants under the above agreement dispossessed another tenant of the parcel of land set off to him, ejectment would lie to recover such possession.

OPINION OF THE COURT, BY JUDD, C. J.

This case comes to us upon exceptions from the Circuit Court, Fifth Circuit, where the case was heard by Circuit Judge Hardy, jury waived. It is an action of ejectment.

The trial Court found the undisputed facts that in January, 1869, some fifty native Hawaiians bought the land of "Wainiha" on the Island of Kauai. On the 10th of September, 1877, a written constitution was signed by them. Of these persons one was Kumahakaua and another Kilauano, the father of the plaintiffs. This "constitution" provided for a general manager (luna nui), secretary and treasurer, and gave the care and control of the land of the company (hui) to the general manager. It was provided by Sec. 5 of the "constitution" that five acres should be set apart to each member of the company. The method adopted was that applications for lots were made in writing, and, on approval as to location, given at a stated meeting of the company held in pursuance of the constitution twice a year, the manager and secretary issued to the applicant a certificate, setting off to him by metes and bounds the parcel of land applied for.

Kumahakaua made application for a parcel of land called "Umi," the one now sued for, and by consent of the manager took possession of it in 1878; but as he had deeded his interest in the land of Wainiha to his son, Kilauano, in 1875, it was awarded by certificate directly to Kilauano in 1881. This allotment was ratified by the company at the meeting of July, 1888. The plaintiffs are the children of this Kilauano, deceased intestate. The defendant W. Kaleikini, also one of the tenants in common of this land, finding the tract in question unoccupied—that is, no one actually living thereon—took possession of it in 1894 and refused to restore it to plaintiffs. Previous to this, in 1890, the company passed a resolution that no member of the hui (company) could cultivate at will land already set apart for another member. He could only do this upon approval by the manager. No evidence of the defendant's contradicted these facts. The Circuit Judge rendered judgment for plaintiffs for the possession of this land, and damages. The exceptions taken by defendant are upon the same grounds upon which a non-suit was asked for in the trial Court, and which was denied. They are substantially as follows:

1. The plaintiffs cannot sue separately for the parcel of land in dispute, because it is only a part of the land of Wainiha, which is owned in common by many others, who have equal rights to every portion of it, and the defendant is one of them.

2. The plaintiffs cannot sue to dispossess defendant from the parcel of land in question, because the land of Wainiha has never been partitioned between the respective tenants in common.

3. In this action all the tenants in common should join either as plaintiffs or defendants.

4. The records of the company do not afford evidence that the land has been legally partitioned in severalty, to each member of the company.

5. Defendant does not hold the land in question for himself alone, but for the company, and his claim is not hostile to the company.

6. No hui (company) has a right to make rules in contravention of the law of the land.

The questions involved in this case are novel, owing to the novel circumstance of a number of persons having purchased a land, and, while using a large portion of it in common, have undertaken to set off specific portions of the land in severalty to each tenant. This is not an uncommon transaction in these Islands. To understand the situation better we must remember (1) that the vendees of the land of "Wainiha" were tenants in common. We so held in Awa v. Horner, 5 Haw., 543. (2) No effectual partition, either voluntary or by judicial action, has been made between the tenants in common.

We then ask what right has one co-tenant to bring ejectment against another co-tenant for a portion of the common estate? There has been no ouster of the plaintiffs by defendant from the entire common estate, but only from a specific portion of the same. Each co-tenant has the right of possession to every part of the common estate. So far forth, then, the defendant is as much entitled as the plaintiffs are to the possession of the parcel of land in question. But there remains the question whether the agreement to occupy in severalty according to the method adopted by the tenants in common is sufficient in law to give a right of action to the tenant to whom it was set off to recover its possession from another co-tenant.

We find no case parallel, but it seems that such an agreement made as this one is, for the common benefit of the owners of the land, to secure harmony and to avoid expense, should be respected by the Court, so long as it continues in force; and we see no difficulty in holding that as between the co-tenants themselves it is good, so far as the mere right of possesssion is concerned. Certainly the defendant had consented in writing to the allotments made in the method pursued. This is a necessary inference from his signing the constitution, which is in fact an agreement as to the method of using the common property. The ouster by defendant is in direct violation of his agreement, which he by inference made when the resolution of 1890 was passed by the company, and to which he presumably consented.

We held in line with this view that rules made by tenants in common regulating the management of their land as regards pasturage thereupon, were binding (until rescinded) upon owners and lessees having notice. In this view of the case, the other points stated in the bill of exceptions are not tenable. Burrows v. Paaluhi, 4 Haw., 464 (1882).

The exceptions are overruled.

A. Rosa for plaintiffs; J. L. Kaulukou for defendant.

Honolulu, July 28, 1896.

In the Supreme Court of the Hawaiian Islands.

June Term, 1896.

F. Harrison and A. V. Gear

v.

J. H. Bruns.

Before Judd, C. J., Frear and Whiting, JJ.

If A and B make an oral contract, by which A is to buy land by auction upon the joint account of both in equal shares, the contract is within the statute of frauds, and after the land has been conveyed to A, B cannot maintain an action for breach of contract.

OPINION OF THE COURT, BY WHITING, J.

The declaration avers an agreement between the plaintiffs and the defendant "whereby they agree to purchase the lease" of certain government premises in Honolulu at public auction, which the defendant, "in pursuance of said agreement," purchased, and thereafter did instruct James A. King, Minister of the Interior, to execute the lease to plaintiffs and defendant according to said agreement; that thereafter the defendant, contrary to said agreement, and after plaintiffs had pursuant to said agreement been put to great expense and inconvenience, and plaintiffs being at all times ready to perform all the conditions of said agreement upon their part, wholly refused to carry out his part of said agreement, and induced the said James A. King to execute a lease of said premises to him, said defendant. The plaintiffs claim damages for breach of the alleged agreement.

The case was returnable at the November term, 1894, of the First Circuit Court, and defendant's answer was a general denial, but at the June term, 1895, the defendant amended his answer as follows: "Said defendant, by leave of Court, amends his answer by adding thereto the following notice: The defendant gives notice that among other defenses he relies upon the statute of frauds."

The trial was held at the February term, 1896, and by direction of the Court the jury returned a verdict for the defendant.

The Minister of the Interior duly advertised for sale at public auction a lease of a government lot on the Esplanade in Honolulu, and at the sale the auctioneer, a clerk of the Interior Department, knocked the lease down to defendant and made an entry to that effect in defendant's name alone at the time, he, the defendant, being the bidder.

The plaintiffs offered to prove by oral testimony that defendant agreed with them that defendant would bid for and purchase the lease of land in question, and that he would purchase such lease for himself and the plaintiffs, and that defendant broke this contract and took the lease in his own name and refuses to let plaintiffs into a share, and for this breach they claim damages.

The plaintiffs also claim that the alleged agreement was in the nature of a partnership; that defendant agreed with plaintiffs to purchase the lease and that the three should be partners in the lease, and that such an agreement was not within the statute of frauds and need not be in writing.

There is no evidence of any memorandum in writing to show the alleged agreement, and the Court below held that the alleged agreement was for the purchase or sale of an interest in lands, and was within the statute of frauds, and declined to permit the alleged agreement to be proved by parol testimony.

The Hawaiian statute of frauds, Sec. 1953 Civil Code (Comp. Laws, p. 309) provides that "no action shall be brought or maintained in any of the following cases: * * * Fourth, upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them, * * * unless the promise, contract or agreement upon which such actions shall be brought, or some memorandum or note thereof, shall be in writing, and be signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

The alleged contract, for the breach of which the plaintiffs claim damages, is clearly a contract for the sale of an interest in lands and within the statute of frauds, and no action can be maintained by plaintiffs for the breach thereof, the same being an oral contract and the plaintiffs failing to prove any memorandum in writing such as is required by the statute.

Parsons v. Philan, 134 Mass., 109.
Pickett v. Durham, 109 Mass., 419.
Bailey v. Hewenway, 147 Mass., 327.

The plaintiffs claim to have excepted to the refusal of the Court to admit certain evidence offered by them, but these exceptions are not set out in the bill of exceptions. The bill contains the following in reference thereto: "At the trial, the plaintiff, to sustain his case, offered certain evidence, which was ruled out by the Court, as will particularly appear from the transcript of the Court reporter's minutes of the proceedings at the trial of said cause, to which several rulings of the Court the plaintiffs duly excepted."

We have repeatedly held that all exceptions relied on by the appellant must appear on the face of the bill of exceptions, otherwise this Court cannot consider them.

Secs. 72, 73 and 74, Chap. 57, Laws 1892.

Kapuakela v. Iaea, 9 Haw., 555.

De Fraga v. Port. Mut. Ben. Soc., 10 Haw. —— June T., 1895.

Haae v. Kuluwaimaka, 10 Haw., —— June T., 1896.

Exceptions overruled.

P. Neumann for plaintiffs; Hartwell, Thurston & Stanley for defendant.

Honolulu, July 29, 1896.